

**Northern District of Connecticut Iron Workers Local Union No. 15, Joint Apprenticeship Committee and its Co-Respondents, the International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 15, AFL-CIO, the Associated General Contractors of Connecticut, Inc., and the Iron Workers' Locals 15 and 424 Apprentice Training Fund and Bruce Gilbert. Case 39-CA-2434**

February 12, 1992

**SECOND SUPPLEMENTAL DECISION AND ORDER ON REMAND**

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

The primary issue in this case is whether Local 15 is a single employer with or alter ego of the Joint Apprenticeship Committee or a successor to it.

On May 7, 1990, the National Labor Relations Board issued a Supplemental Decision and Order<sup>1</sup> in this proceeding. The Board affirmed the administrative law judge's decision and adopted the recommended Order, with a slight modification to the backpay computation, finding that the Respondent, Northern District of Connecticut Iron Workers Local Union No. 15, Joint Apprenticeship Committee (JAC), and its Co-Respondents, the International Association of Bridge, Structural and Ornamental Iron Workers Local No. 15, AFL-CIO (Local 15 or Union), and the Associated General Contractors of Connecticut, Inc. (AGC), were liable for the backpay due discriminatee Bruce Gilbert.<sup>2</sup>

On April 4, 1991,<sup>3</sup> the United States Court of Appeals for the Second Circuit issued an opinion denying enforcement of the Board's Order in part and remanding the case to the Board for further proceedings consistent with the court's opinion.

On June 17, 1991, the Board advised the parties that it had accepted the remand, and that all parties could submit statements of position with respect to the issues raised by the remand. The General Counsel and Respondent Local 15 filed statements of position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reconsidered this case in light of the court's opinion, which is the law of the case, and the parties' statements of position, and has decided to dismiss the backpay specifications involving Respondent Local 15 in their entirety.

<sup>1</sup> 298 NLRB 445. Member Raudabaugh did not participate in the underlying decision.

<sup>2</sup> The Board also adopted the judge's finding that the Respondent Iron Worker Locals 15 and 424 apprentice training fund (Fund) is not liable for the backpay due Gilbert.

<sup>3</sup> *AGC of Connecticut v. NLRB*, 929 F.2d 910 (2d Cir. 1991).

**Background**

The Respondent JAC is an unincorporated association that was established to oversee the operation of training programs for apprentices and journeymen ironworkers pursuant to the collective-bargaining agreement negotiated between Local 15 and AGC.<sup>4</sup> The collective-bargaining agreements have included the same provision reflecting the parties' agreement to

establish and maintain joint apprenticeship committees in accordance with the provisions of the "Iron Workers Apprenticeship and Training Standards" as approved by the Connecticut State Apprenticeship Council. Said committees shall formulate and operate an apprenticeship program.

The JAC is composed of three management and three labor members who serve uncompensated 3-year terms. To ensure joint participation and equal representation, the provisions covering the JAC provide that the chairmanship of the JAC is alternated between the union and management representatives, and the secretary is selected from the group that is not represented by the chairman.

The JAC determines the number of apprentices needed, establishes minimum standards of education and experience, places apprentices under agreement with employers, determines the on-the-job experience apprentices must obtain, hears and adjusts grievances, arranges tests, maintains records, and certifies apprentices who have successfully completed their apprenticeship training. The JAC is explicitly authorized to hire an apprenticeship training coordinator to implement the training programs. Discriminatee Bruce Gilbert was hired by the JAC in 1979 as training coordinator to conduct the routine day-to-day operations of the apprenticeship programs, and to oversee all aspects of the program including procuring supplies, placing apprentices for on-the-job experience, and performing various administrative functions.

On July 31, 1984, the members of the JAC unanimously voted to discharge Gilbert as its apprenticeship training coordinator. On March 11, 1986,<sup>5</sup> the Board issued its original Decision and Order finding that Gilbert had been discharged because of his intraunion activities, in violation of Section 8(a)(3) and (1) of the Act. The Board ordered the JAC to offer Gilbert immediate and full reinstatement to his former job and to make him whole for any loss of earnings and benefits suffered as a result of its unlawful conduct. The

<sup>4</sup> Local 15 has been a party to successive collective-bargaining agreements with the labor relations division of the AGC, an association made up of construction firms specializing in steel erection and related services.

<sup>5</sup> *Iron Workers Local 15*, 278 NLRB 914 (1986).

Board's Order was enforced by the court of appeals.<sup>6</sup> The JAC refused to obey the court's order and a contempt proceeding was begun. On March 21, 1988,<sup>7</sup> the court of appeals affirmed the district judge's finding that the JAC was in contempt. The court ordered the JAC to purge itself of contempt by reinstating Gilbert and meeting its backpay obligation.

The JAC, in further contempt of the court's orders, initially failed to reinstate Gilbert or satisfy its backpay obligation. However, on May 2, 1988, in response to a writ of body attachment against Carl Johnson, the JAC's chairman, Gilbert was reinstated as the JAC's apprenticeship training coordinator.

On September 15, 1988, after determining that the JAC had no financial means to satisfy the monetary portions of the court's purgation order, the court of appeals ordered the JAC to mail notices concerning the remedy. The court of appeals also remanded the contempt case back to the Board for a determination of the amount of backpay owed Gilbert under prior Board and court orders, and to consider whether Local 15, the AGC, and the Fund could be held liable for the backpay award.<sup>8</sup>

The Board, in the Supplemental Decision and Order,<sup>9</sup> found, in agreement with the judge, that the AGC and the Union were, as noted, jointly and severally liable for the backpay award to Gilbert but that the Fund was not. The judge found that the AGC was a party to the collective-bargaining agreement that established the JAC, that the AGC was vested with the authority to appoint the management members of the JAC, and that the AGC appointed JAC Chairman Johnson, who was responsible for recruiting other management representatives. The judge also found that the Local 15 president had the authority to appoint the union members of the JAC. The judge concluded that Local 15 and the AGC were coprincipals of the JAC and were therefore derivatively liable for the backpay due Gilbert.

The court of appeals denied enforcement of the Board's Order concerning AGC. The court determined that there was no basis for holding the AGC derivatively liable for the backpay due Gilbert.<sup>10</sup> The court also disapproved the basis used by the Board for finding Local 15 derivatively liable for the backpay award against the JAC. The court held that the only basis for

finding derivative liability in a supplemental compliance proceeding is on a showing of single-employer, alter ego, or successor employer status. The court found that there was a thin but viable basis for finding alter ego or single-employer status. In this regard, the court noted the evidence of entanglement and commingling of funds between the JAC and Local 15, the fact that union committee member Etkin's power within the JAC was derived from his presidency of Local 15, and Local 15's conduct indicating that it viewed itself as Gilbert's employer. The court remanded the issue of Local 15's potential liability to the Board.<sup>11</sup>

The General Counsel submitted its statement of position on remand and a motion to reopen the record for receipt of additional evidence bearing on the issues raised by the remand. The General Counsel asserts that the evidence developed during the original and supplemental proceedings, combined with evidence of events since the close of record in the supplemental proceeding, establishes that Local 15 should be found derivatively liable for the backpay award based on its alter ego, single-employer, or successor relationship to the JAC.

Respondent Local 15 submitted its statement of position asserting that "the doctrine of laches and general principles of due process bar the Regional Director from amending the Complaint more than six years after the fact to allege that Local 15 and the JAC are a single employer and/or that Local 15 is the alter ego of the JAC."<sup>12</sup> The Respondent also argues that the allegations that Local 15 and the JAC are a single employer of Gilbert or that Local 15 is the alter ego of the JAC are not supported by the evidence, and that no further proceedings should be conducted in this matter. The Respondent does not address the successorship issue.

We have accepted the court's remand as the law of the case. Accordingly, we cannot find that Local 15 and the JAC had a principle-agency relationship. We find that the evidence is insufficient to establish that Local 15 and the JAC are a single employer or that Local 15 is the alter ego of the JAC. Nor is the evidence sufficient to establish that Local 15 is a successor employer to the JAC.

#### A. Single Employer

It is well settled that the Board may find that a single-employer relationship exists where two nominally separate entities are found to be part of a single-inte-

<sup>6</sup>*NLRB v. Iron Workers Local 15*, 805 F.2d 391 (2d Cir. 1986) mem.

<sup>7</sup>*NLRB v. Iron Workers Local 15*, Nos. 86-4060, 86-4080 (2d Cir. Mar. 21, 1988).

<sup>8</sup>*NLRB v. Iron Workers Local 15*, Nos. 86-4060, 86-4080 (2d Cir. Sept. 15, 1988).

<sup>9</sup>Supra at fn. 1.

<sup>10</sup>The court determined that the AGC could not be held liable in either an unfair labor practice or supplemental compliance proceeding for the backpay due Gilbert because it was not the sole employer signatory to the collective-bargaining agreement and could not act on behalf of signatory non-AGC employers.

<sup>11</sup>Supra at fn. 3.

<sup>12</sup>We reject this argument. In *Coast Delivery Services*, 198 NLRB 1026, 1027 (1972), we held that derivative liability could be imposed on a party to a supplemental proceeding "even though [it] had not been a party to the proceeding in which the unfair labor practices were found, if [it] was sufficiently closely related to the party found to have committed the unfair labor practices." Furthermore, Local 15 has not shown that it was prejudiced by the delay.

grated enterprise. The Board considers whether there is an interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control in finding a single-employer relationship. *Radio Union Local 1264 v. Broadcast Service*, 380 U.S. 255 (1965); *Wisconsin Education Assn.*, 292 NLRB 702, 711 (1989). In finding that a single-employer relationship exists, not one of these factors is controlling, and the presence of all four factors is not necessary. The single-employer relationship has also been characterized as an absence of an "arm's length relationship found among unintegrated companies." *Operating Engineers Local 627 v. NLRB*, 518 F.2d 1040, 1045-1046 (D.C. Cir. 1975), *affd.* on this issue sub nom. *South Prairie Construction Co. v. Operating Engineers Local 627*, 425 U.S. 800 (1976). Ultimately, in finding that a single-employer relationship exists, all the circumstances present in each case must be considered.<sup>13</sup>

The JAC is a cooperative undertaking by Respondent Local 15 and various employer groups, including the AGC, for the purpose of training apprentices. The JAC consists of three management and three labor representatives who are each selected by the group they represent. As discussed below, Local 15 does not by itself exercise management, or labor-relations control over the JAC. Neither does it by itself have an interrelationship of operations with the JAC. Rather, Local 15 shares these attributes with AGC. In these circumstances, while Local 15 and AGC may be joint venturers, Local 15 is not a single employer with the JAC.<sup>14</sup>

The General Counsel, in asserting that Respondent Local 15 controls the JAC's labor relations policies, relies heavily on Local 15's role in obtaining the discharge of Gilbert. Local 15's president, himself a JAC committeeman, was able to persuade the other union representatives and the employer representatives on the JAC to join in voting for the discharge of Gilbert. The ability of Local 15 to influence the JAC on this issue does not, without more, demonstrate that the JAC in general, or the employer representatives in particular, have ceded control of labor relations to Local 15. There is no evidence that Local 15 regularly controls the hiring or firing of JAC employees.

<sup>13</sup> The concept of single employer and alter ego should not be confused with that of "joint employer." Under the latter doctrine, separate firms which "share, or co-determine, those matters governing essential terms and conditions of employment" of the employees involved, are joint employers of those employees, regardless of whether the firms are commonly owned, operated, or controlled. *NLRB v. Greyhound Corp.*, 368 F.2d 778, 780 (5th Cir. 1966). Joint employer status is not, however, an issue in the present case.

<sup>14</sup> Under agency principles, joint venturers can be held liable for the unlawful acts of the joint venture. However, an agency theory of Local 15 liability is foreclosed by the Second Circuit's opinion.

The General Counsel urges that there is other evidence which demonstrates that Local 15 controls the JAC's labor relations policies. Again, there is no doubt that Local 15 played an active role in labor relations at the JAC. The items cited by the General Counsel are consistent with that role. These items, however, even considered cumulatively, do not establish that the employer representatives relinquished their role in the JAC's labor relations. Thus, while Local 15 Business Agent Foley issued a layoff slip to Gilbert, he performed that task at the request of the JAC's chairman, Carl Johnson, an employer representative. Similarly, Foley attended Gilbert's unemployment compensation hearing at Johnson's request. Regarding evidence showing that about 6 months before Gilbert's discharge Local 15 assumed his previous role of placing apprentices on jobs as part of training, this does not indicate anything more than the fact that Local 15 played a significant role in the operations of the JAC during that period. It does not establish that Local 15 controlled the labor relations of the JAC vis-a-vis JAC employees.

The General Counsel asserts that, since April 1989, Local 15 has completely taken over the operations of the JAC. That contention is based on the deposition of Chairman Johnson which the General Counsel seeks to have accepted as additional evidence. During that deposition, Johnson was asked whether anyone is performing the duties formerly performed by the training coordinator. He responded that "[t]he committee as a whole performs those duties. Mike Coyne probably gets stuck with the brunt of it but all of us participate to a certain extent in the record keeping. Things like that." Although that testimony demonstrates that Local 15 Business Agent Mike Coyne now plays a very active role in performing the coordinator functions, it fails to show, even in April 1989, much less before, that Local 15 had completely taken over the operations of the JAC or that Local 15 controls the JAC's labor relations policies vis-a-vis JAC employees.

With respect to the General Counsel's contention that the operations of the JAC are interrelated with those of Local 15, it is true that a purpose of the JAC is to assist Local 15 in acquiring and retaining trained employees for referral. However, the JAC also serves the interests of employer groups which use the program as a source of trained employees. The General Counsel notes that the collective-bargaining agreement sets forth the terms and conditions of the apprenticeship program. However, the agreement is between the employer groups and Local 15 and each has a significant interest. The fact that some of the training included instruction on what is required to be a union member in good standing and that the union membership received regular reports on the program shows only that Local 15 sought to derive benefits from the

program, just as the employer groups derive benefits. These facts do not establish that the operations of Local 15 and the JAC are so interrelated as to warrant a finding of single-employer status.

The General Counsel urges that Gilbert's work as an overseer of the participants in the training program establishes that there is an intimate relationship between Local 15 and the JAC. He notes that Gilbert spent a great deal of time at Local 15 jobsites overseeing the work of the apprentices. As the General Counsel notes, the work of each apprentice is supervised by the foreman at the jobsite and is reviewed by both the foreman and the job steward. Each apprentice's progress is monitored by both Local 15 and company officials. Again, while the evidence does establish a connection between Local 15 and the apprenticeship training program, it appears to also establish an equally strong connection between officials of the various employer groups and the training program committee. Everyone with an interest in the JAC has a role in ensuring that the apprenticeship training program is successful.

The General Counsel points to some administrative procedures that, he urges, are evidence of the interrelation of operations. Thus, the coordinator's pay was initially paid from a Local 15 bank account, and Local 15 was thereafter reimbursed by the Fund;<sup>15</sup> until 1984 the JAC rented office space from Local 15; the JAC employed Local 15's office secretary on a part-time basis, and paid Local 15 a flat rate per week for her services; Gilbert, as discussed above, as well as his successor, received a Local 15 imprinted layoff slip from Foley, as also discussed above, Foley attended Gilbert's unemployment compensation hearing; and Gilbert, while serving as training coordinator, was permitted to hold office in Local 15. Each of these items, with the possible exception of the last item, are further evidence to establish that Local 15 is involved in the operations of the JAC. These facts do not, however, establish a level of involvement more than could be expected in such a joint venture.<sup>16</sup>

The General Counsel also asserts that Local 15 and the JAC have common management. Again, Local 15 as a participant in the JAC plays an active role in its management. The same is true with respect to the employer group representatives. Indeed, despite the provisions in the JAC's standards for the rotation of the chairmanship between employer and union representatives, it has been an employer representative, Johnson, who has served as chairman of the JAC since 1983. There is no evidence which in any way suggests that

he and the other employer representatives did not fully participate in the management of the JAC.<sup>17</sup>

Obviously, Local 15, as a partner in the cooperative venture, played a very active role in the operations of the JAC. The same is true of the employer group representatives to the JAC. The employer group representatives and the representatives of Local 15 shared control over the JAC and its employee Gilbert. In these circumstances, we find that there is insufficient basis for concluding that Local 15 is a single employer with the JAC.

### B. *Alter Ego Status*

The alter ego doctrine is an extension of the concept of single employer. Thus, two nominally separate business entities may be regarded as a single employer if one is the alter ego or "disguised continuance" of the other. *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942). In determining "whether two facially independent employers constitute alter egos" under the Act, the Board has long held that "although each case must turn on its own facts, we generally have found *alter ego* status where the two enterprises have 'substantially identical [ownership], management, business purpose, operation, equipment, customers and supervision.'" *Advance Electric*, 268 NLRB 1001, 1002 (1984). In *Advance Electric*, the Board held that in determining whether an alter ego status was present, it would consider "whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead, its purpose was to evade responsibilities under the Act," but that such intent is not an essential element of an alter ego relationship. See also *Fugazy Continental Corp.*, 265 NLRB 1301, 1302 (1982), *enfd.* 725 F.2d 1416 (D.C. Cir. 1983); *Goodman Piping Products v. NLRB*, 741 F.2d 10, 12 (2d Cir. 1984).

The General Counsel asserts that the evidence used to establish that Local 15 and the JAC are a single employer, also establishes that Local 15 is the alter ego of the JAC. In this regard, the General Counsel argues that the evidence establishes that Local 15 and the JAC share substantially identical management; their business purpose and operations are the same; the apprentices are "customers" of both entities; the JAC use of Local 15 offices for secretarial support services and its physical use of the Local 15 offices constitute a shared use of equipment; and the JAC is supervised by Local 15 officials. The only element missing is the lack of substantially identical ownership.

The General Counsel also argues that the events that have occurred since the close of the record in the supplemental proceeding show further that Local 15 is the

<sup>15</sup>To the extent that this can be described as a commingling of funds, it is very limited in nature and did not involve the JAC. The JAC has no funds. The moneys involved belonged to the Fund. None of the moneys of the Fund were ever combined with those of Local 15.

<sup>16</sup>See fn. 14 *supra*.

<sup>17</sup>The General Counsel concedes there is no evidence of common ownership and correctly notes that given the unique relationship among the JAC, Local 15, and the AGC, and the Fund, this factor would not play any role in determining single-employer status.

alter ego of the JAC. In support of its contention, the General Counsel is seeking to reopen the record for the purpose of introducing portions of depositions of JAC Chairman Carl Johnson and of Dennis Foley, fund trustee and Local 15 business agent. The General Counsel asserts that Local 15 has completely taken over the operations of the JAC and that the purpose of that “takeover” was to evade the JAC’s responsibilities under the Act to reinstate Gilbert. The General Counsel also notes Judge Snyder’s finding in the supplemental proceeding that “the identity of [Local 15] and [the JAC] appeared to have merged,” which was specifically noted by the Second Circuit, as possible evidence that Local 15 has effectuated the “takeover” and is therefore the alter ego of the JAC.<sup>18</sup>

Respondent Local 15 argues that the same factors used to determine that it is not a single employer with the JAC, also establish that Local 15 is not an alter ego of the JAC.

Contrary to the contentions of the General Counsel, we find no basis for finding that Local 15 is the alter ego of the JAC. The same factors discussed in connection with our rejection of the General Counsel’s assertion that Local 15 is a single employer also establish that the JAC is not an alter ego of Local 15.<sup>19</sup> Rather, the JAC operates under the shared control of Local 15 and the employer groups acting through their representatives. *Marino Electric*, 285 NLRB 344 (1987).

### C. Successorship Status

It is settled law that a successor employer, who acquires the business of a predecessor with knowledge of unfair labor practice charges against the predecessor may be held responsible for remedying the predecessor’s violations of the Act, including backpay liability. *Perma Vinyl Corp.*, 164 NLRB 968 (1967), enf. sub nom. 398 F.2d 544 (5th Cir. 1968), approved by

<sup>18</sup>The reference, in context, to the identity of Local 15 and the JAC merging is limited to former Union President Etkin’s ability to influence the union and employer representatives on the committee to effectuate Gilbert’s discharge. The judge found that Etkin was motivated by internal union political interests and manipulated the other members of the JAC to bring about a replacement of the training coordinator. The judge found further that Carl Johnson, an AGC appointee and chairman of the JAC, and part owner of an AGC employer member, carried out his own hostility in voting to terminate Gilbert which arose out of Gilbert’s opposition to Johnson’s participation in a union election. Therefore, it is clear that both union and employer group representatives participated in the decision to terminate Gilbert, and Local 15 did not unilaterally discharge Gilbert without the sanction of the employer members of the JAC.

<sup>19</sup>The same basic “indicia for finding a ‘single employer,’ i.e., interrelation of operations, centralized control of labor relations, common management, and common ownership or financial control,” is also relevant to finding an alter ego relationship. However, more must be shown to establish that one organization is the alter ego of another at least when the putative alter ego exist simultaneously and thus one cannot be said to be a disguised continuance of the other. *Victor Valley Heating*, 267 NLRB 1292, 1296 (1983).

the U.S. Supreme Court in *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973).

The General Counsel asserts that the events that have occurred since the close of the record in the supplemental proceedings show that Local 15 has effectively “acquired” and is actually “operating” the JAC. In support of its contentions, again the General Counsel seeks to reopen the record and rely on portions of depositions of JAC chairman, Carl Johnson, and of Dennis Foley, fund trustee and Local 15 business agent. The General Counsel argues that the depositions clearly establish that since April 1989, the JAC and Local 15 ceased maintaining separate offices; that the JAC’s records have always been maintained at Local 15 offices; that the JAC has continued to operate a full apprenticeship program since Gilbert’s layoff in April 1989, with Local 15’s business agent performing “the brunt” of the training coordinator’s duties without additional compensation; and that the Local 15 secretary has continued to perform services for the JAC from Local 15 offices. In addition, the General Counsel states that Local 15 was fully aware of the unfair labor practices committed by the JAC, and that finding that Local 15 liable as a *Golden State* successor to the JAC to remedy the JAC’s unfair labor practices is appropriate.

Respondent Local 15 does not address the theory that Local 15 may be a successor employer of the JAC.

We find contrary to the General Counsel’s analysis of the facts that Local 15 does not meet the criteria for successorship. There obviously is no evidence of a bona fide purchase of the JAC by Local 15. Further, as noted above, the deposition of Johnson offered to support the assertion of successorship in fact establishes that the committee continues to function as it did before, under the joint control of Local 15 and the employer group representative. Thus, Johnson, an employer representative, testified that all committee members participate in performing the duties formerly performed by the training coordinator. The only significant change is that it appears that more of the burden of the coordinator duties has fallen on Coyne. Accordingly, we find that the evidence is insufficient to establish that Local 15 is a successor employer to the JAC.<sup>20</sup>

### ORDER

The backpay specifications related to Respondent Local 15 are dismissed in their entirety.

<sup>20</sup>We have throughout this decision considered the General Counsel’s “additional evidence” in order to determine whether such additional evidence would affect the outcome of these proceedings. Because we conclude that the proffered evidence would not change the result, we deny the motion to reopen the record for the receipt of this evidence.